A **TAN YOKE MEE & ANOR v. TAJUDIN IBRAHIM & ORS**

COURT OF APPEAL, PUTRAJAYA
MARY LIM JCA
HAS ZANAH MEHAT JCA
VAZEER ALAM MYDIN MEERA JCA
B [CIVIL APPEAL NO: W-01-(NCVC)(W)-462-07-2018]
23 OCTOBER 2019

LAND LAW: *Ownership – Ownership of property – Discovery that strata title for land issued to another party – Whether owner legal and/or beneficial owner or*
C *property – Whether property only held in trust – Whether sale and purchase agreement entered into conditional agreement – Whether conditions precedent fulfilled or waived – Whether there was uncertainty in subject matter – Whether there was negligence by solicitors – Whether there were suspicious events surrounding transfer and issuance of strata title – Whether there were discrepancies*
D *in agreements relied on by owner of property*

The appellants ('the plaintiffs') entered into a sale and purchase agreement ('SPA') with the fifth respondent ('fifth defendant') to purchase a parcel of shop lot ('the property'). After paying the purchase price in full, the plaintiffs rented out the property to various tenants. Years later, the plaintiffs
E discovered that the strata title for the property had been issued to the first defendant. When the first defendant asserted possessory rights over the property, the plaintiffs sought, *inter alia*, a declaration at the High Court that (i) the plaintiffs were the legal and/or beneficial owners of the property; and/or in the alternative, (ii) the first respondent ('first defendant') was the trustee
F for the plaintiffs of the property. Relying on the terms and conditions of the SPA, the plaintiffs alleged that the SPA stated (i) by a SPA ('principal agreement'), entered into between the developer of the property, the second respondent ('second defendant') of the first part, the third respondent ('third defendant') of the second part and the first defendant as the first purchaser,
G the second defendant, with the third defendant's consent, agreed to sell and the first defendant agreed to purchase the property with vacant possession; (ii) by a second SPA ('second agreement') entered into between the first and fourth defendants as second purchaser, the first defendant sold and the fourth defendant purchased and accepted the assignment of the property together with all the rights, title and interest of the first defendant under the principal
H agreement; (iii) by a third SPA ('third agreement') and a corresponding deed of assignment made between the fourth defendant of the first part, and the fifth defendant of the other part, the fourth defendant sold and assigned and the fifth defendant purchased and accepted an assignment of the property

I

together with all the rights and interests of the fourth defendant under the principal agreement; (iv) the fifth defendant purchased and settled the purchase price in full to the second defendant under the principal agreement; and (v) the plaintiffs purchased the property from the fifth defendant and paid the purchase price in full. The plaintiffs also claimed against the sixth respondent ('the sixth defendant'), the solicitors acting for them in respect of the SPA, for negligence. In its defence, the second respondent submitted that the master title number of the plaintiffs' unit, mentioned in the SPA, differed from that appearing in the principal agreement and there were also differences in the measurement of the unit concerned. The first defendant counterclaimed that he be declared the registered owner of the property and that the plaintiffs had been wrongfully and illegally occupying and renting out the property. The High Court (i) dismissed the plaintiffs' claim on the grounds that (a) the SPA was a conditional agreement and there was no evidence that the conditions precedent had been fulfilled or waived; (b) there was no compelling evidence as there was uncertainty in the subject matter; and (c) there were no particulars of negligence alleged against the sixth defendant and no cogent evidence adduced; and (ii) dismissed the first defendant's counterclaim on the grounds that the transfer and issuance of the strata title to the first defendant were suspicious. Hence, the present appeals by the plaintiffs against the first, second, fifth and sixth defendants.

Held (allowing appeal in terms)
Per Mary Lim JCA delivering the judgment of the court:

(1) The High Court Judge failed to have regard to the totality of evidence and had not properly appreciated the evidence. The overwhelming evidence was that the plaintiffs' claim was indeed proved on a balance of probabilities and ought to have been allowed. (para 33)

(2) The SPA was not a conditional agreement and it was not void for uncertainty. The existence and authenticity of the three agreements relied on by the appellants were not in issue. The actions taken by the various parties thus far in any case, affirmed the existence of these agreements; especially the action taken by the fifth defendant in suing the fourth defendant to assert his rights under the third agreement. Further, the arguments raised in relation to the assignment or lack of such assignment were also irrelevant since the title to the property had already been issued. The matter of certainty of subject matter, whether the property which formed the subject matter of the SPA was the same subject property under the principal agreement and the second and third agreements but more importantly, whether it was the same property to which strata title had been issued to the first defendant. The answer was clearly in the affirmative. (paras 16 & 17)

(3) The property under the SPA was readily traced to and through the several agreements starting with the principal agreement made between the first and second defendants. The subject property of that principal was clearly acknowledged in the SPA. Save for the differences in the size of the property and the details of the title in the master title, the other details identifying the subject matter or property were clear and the parties were not confused to the point where there was no *consensus ad idem* such as to invalidate the SPA. The differences were minor and could be and were easily explained by the plaintiffs and the witnesses called. The discrepancy, if at all there was one, appeared to be in the description of the master title. Save for this discrepancy, the property was always otherwise described and recognised as a 'shop lot', be it under the principal agreement, the SPA or the second and third agreements. What appeared to be overlooked was that the former lot numbers of the land in question were the same. (paras 18 & 23)

(4) The third defendant was not entitled to transfer the registration of the strata title in favour of the first defendant as the first defendant had already divested his interest in the property by virtue of the second agreement, the existence and validity of one which could not be disputed. The third defendant held the property in trust for the plaintiffs as bare trustee as the plaintiffs had fully paid up the purchase price. Both the second and third defendants had notice of the defendants' interest as assignee of the rights over the property. In law, these defendants, as trustees, were therefore obliged to at least apply to the court under O. 80 of the Rules of Court 2012 for a determination of the issue of the rights rather than to act unilaterally and transfer the strata title to the first defendant. Since the first defendant had already sold his interest to the fourth defendant under the second agreement, the first defendant now held the property registered in his name as bare trustee for the plaintiffs. (paras 28 & 29)

(5) There was no case established against the sixth defendant. The claim was correctly dismissed and the appeal was therefore dismissed. (para 32)

Case(s) referred to:

Perbadanan Kemajuan Pertanian Selangor v. JW Properties Sdn Bhd [2017] 8 CLJ 392 FC ***(refd)***

For the appellants - Michael Chow & Wong Zhi Khung; M/s Micheal Chow
For the 1st respondent - SS Gabriel; M/s N Saraswathy Devi
For the 2nd respondent - G Gunaseelan & M Ramachandran; M/s Rama Samuel & Assocs
For the 3rd respondent - Ashmadi Othman; M/s Zulpadli & Edham
For the 4th respondent - Mohd Zulkhairi Kamaruzaman & Nurul Nabila Azmi
For the 5th respondent - In person
For the 6th respondent - JJ Naidu; M/s JJ Naidu dan Rakan-Rakan

[Editor's note: Appeal from High Court, Kuala Lumpur; Suit No: WA-22NCVC-341-06-2016 (overruled)).]

Reported by Najib Tamby

JUDGMENT

Mary Lim JCA:

[1] The appellants before us were the plaintiffs at the High Court. Their suit was primarily to assert legal and beneficial ownership rights over a shop lot. The first respondent counterclaimed for the same purpose while the sixth respondent counterclaimed for damages for defamation.

[2] After a full trial, their claims and the counterclaims were dismissed by the learned judge. Only the plaintiffs appealed. At the commencement of hearing of this appeal, the appellants withdrew their appeal against the third and fourth respondents, and the appeal was accordingly struck out against them with costs.

[3] In this appeal, the parties will be referred to as they were at the High Court.

Background Facts

[4] By a sale and purchase agreement dated 5 August 2008, the plaintiffs purchased from the fifth defendant, an individual, "the parcel of shop lot known as Parcel D-G-4 measuring an area approximately 840 sqf within Storey No. 4 of Building No. Block D in a project known as Taman Fadason forming part of the land held under Master Title No. H.S.(D) 99535, P.T. No. 16914 (formerly part of Lot 9016 and 9017) in the Mukim of Batu, District of Kuala Lumpur and State of Wilayah Persekutuan" (the property) for the sum of RM800,000 (the SPA). The plaintiffs paid the purchase price in full and were given vacant possession of the property from around August 2008. The plaintiffs have since then been renting out the property to various tenants without interruption. The plaintiffs have also been paying the quit rent, assessment charges, water, insurance and service charges for the property.

[5] In December 2015, the plaintiffs discovered that strata title for the property had been issued to the first defendant who proceeded to assert possessory rights over the property. The plaintiffs commenced action seeking the following main reliefs:

(a) a declaration that the plaintiffs are the true legal and/or beneficial owners of the property currently held under title PN(WP) 32992/M1/1/5, Lot No. 57297, Mukim Batu, Negeri Wilayah Persekutuan, Kuala Lumpur;

(b) further and/or in the alternative, a declaration that the first defendant is trustee for the plaintiffs of the property and is bound to account to the plaintiffs any legal estate or interest therein outstanding in relation to the property;

(c) further and/or in the alternative, an order for rectification of the pleaded agreements, as the case may be;

(d) an order directing the defendants to within seven days from the service of the order made herein take all steps to vest the property in the name of the plaintiffs as legal proprietor and beneficial owners thereof;

(e) an injunction restraining the defendants from interfering with the plaintiffs' rights and possession over the property; and

(f) damages to be assessed against the defendants or such of the defendants as the court shall find liable to the plaintiffs.

[6] Relying on the terms and conditions of the SPA, the plaintiffs alleged that the SPA states the following:

(i) by SPA dated 30 November 2002 (principal agreement) made between the second defendant of the first part, the third defendant of the second part and the first defendant as 'first purchaser', the second defendant with the third defendant's consent agreed to sell and the first defendant agreed to purchase the property with vacant possession;

(ii) first defendant had fully paid the purchase price to the second defendant;

(iii) by SPA dated 13 June 2005 (second agreement) made between first defendant and the fourth defendant (second purchaser), the first defendant sold and the fourth defendant purchased and accepted the assignment of the property together with all the rights title and interest of the first defendant under the principal agreement and upon the terms and conditions stated therein;

(iv) by SPA dated 4 July 2006 (third agreement) and a corresponding deed of assignment dated 4 July 2006 made between the fourth defendant of the first part, and the fifth defendant of the other part, the fourth defendant sold and assigned and the fifth defendant purchased and accepted an assignment of the property together with all the rights title and interest of the fourth defendant under the principal agreement and upon the terms and conditions stated therein;

(v) the sale to the fifth defendant is subject to the fifth defendant obtaining confirmation from the second defendant and/or relevant authorities as provided under cl. 2.1;

(vi) the fifth defendant has settled the purchase price in full to the second defendant under the principal agreement;

(vii) by SPA dated 5 August 2008 (SPA) made between the fifth defendant as vendor and the plaintiffs as purchasers, the fifth defendant agreed to sell and the plaintiffs agreed to purchase the property;

(viii) the plaintiffs have fully settled the purchase price under the SPA;

(ix) strata title to the property had not been issued by the relevant authority; and

(x) the plaintiffs were represented by the sixth defendant while the fifth defendant elected not to appoint any solicitors to act on his behalf.

[7] Save for the fifth defendant who did not enter any appearance, the remaining defendants filed their respective defences with the first defendant asserting title and interest by way of a counterclaim and seeking vacant possession. The first and second defendants were initially represented by the same set of solicitors but by the time of appeal, were represented by different solicitors. Due to the peculiarities of the claim, the fourth defendant was represented by the Registrar of Companies; the details of which are no longer relevant with the withdrawal of the appeal against this party.

[8] In substance, the first defendant denied the plaintiffs' claims. In particular, the first defendant:

(i) denied knowledge of the various agreements and the SPA;

(ii) claimed that he was not privy to any of the agreements;

(iii) claimed that he did not give vacant possession to anyone;

(iv) alleged that the plaintiffs' claim for vacant possession was wrong and that the plaintiffs had committed trespass;

(v) claimed that all payments for quit rent and assessments were made by him and that the receipts for such payments were issued in his name; and

(vi) claimed that the strata title has been issued to him as the registered and legal owner of the property.

[9] The first defendant counterclaimed that he be declared the registered owner of the property; that the plaintiffs had been wrongfully and illegally occupying the property and had been renting out the property to third parties. The first defendant further claimed for vacant possession and general damages to be assessed by the court.

[10] As for the second defendant, the developer of Taman Fadason, aside from alleging that master title number of the plaintiffs' unit as mentioned in the SPA differed from that appearing in the principal agreement and that there was a difference in the measurement of the unit concerned, the second defendant denied owing any contractual obligation or duty to the plaintiffs; especially since it was not a party to the SPA. Instead, its obligations were owed to the first defendant as set out under the principal agreement. Those obligations were met when it assisted in the application of the third defendant's consent to transfer so that title could be registered in the first defendant's favour. It had further not endorsed or confirmed the sale and purchase of the unit by the plaintiffs.

[11] The sixth defendant were the solicitors acting for the plaintiffs in respect of the SPA. The allegations against them are grounded in negligence, that the sixth defendant was in breach of its duty of care owed to the plaintiffs in the following respects:

(i) failing to steps to perfect the plaintiffs' rights over the property;

(ii) failing to keep the plaintiffs duly informed of all rights pertaining to the property and/or in relation to the SPA;

(iii) failing to ensure that all steps have been taken to ensure that upon issuance, the relevant strata title would be registered or be registrable in the names of the plaintiffs;

(iv) failing to advise the plaintiffs of their rights in relation to the property and/or how such rights may be protected;

(v) failing to notice the blatant discrepancies arising from the third agreement and the assignment and novation agreement as to whether the purchase price had been paid to the second defendant and the identity of the person concerned;

(vi) failing to conduct a land search for the master title which would have yielded up the misdescriptions earlier mentioned; and

(vii) without the knowledge or consent of the plaintiffs, commenced civil action against the second and third defendants seeking to compel them to consent to the sale of the property from the fifth defendant to the plaintiffs; and when the action was dismissed, for failing to advise the plaintiffs of the action and of their withdrawal of the related appeal.

Decision Of The High Court

[12] The learned judge dismissed the plaintiffs' claim and the counterclaim. In relation to the plaintiffs' claim that they be declared beneficial and/or legal owners of the property, this was refused on two grounds. First, because

the SPA was a conditional agreement and there was no evidence that the conditions precedent had been fulfilled or waived. Second, because of uncertainty in the subject matter – that there was no compelling evidence before the court that the property described in the SPA was the same property referred to as "D-G-5" and/or "D-O-5".

[13] As for the counterclaim, it is readily discerned that it was dismissed because the learned judge disbelieved the first defendant finding the transfer and issuance of the strata title to the first defendant "very suspicious and something is amiss in the whole transaction of the transfer of the strata title to D1 – see paras. 4.9-4.10 of D6's written submission." The learned judge did not find the first defendant to be a credible witness, that there were inconsistencies in his evidence as well as those of another witness, Jaya Jothi (DW2). There is no appeal by the first defendant.

[14] The claim against the sixth defendant was also dismissed; because there were no particulars of negligence alleged against the sixth defendant, and because no cogent evidence to support the allegation of negligence had been adduced. The sixth defendant had also counterclaimed for defamation. This was dismissed; there is no appeal by the sixth defendant.

Our Decision

[15] Having examined the records of appeal, the reasons for Her Ladyship's decision and the submissions made, we find merit in the plaintiffs' appeal.

[16] In essence, we disagree with Her Ladyship's conclusions that the SPA is a conditional agreement and that it is void for uncertainty. We must point out at the outset that the existence and authenticity of the three agreements relied on by the appellants are not in issue. The actions taken by the various parties thus far in any case, affirm the existence of these agreements; especially the action by the fifth defendant in suing the fourth defendant to assert his rights under the third agreement. Further, the arguments raised in relation to the assignment or lack of such assignment are also irrelevant since title to the property has already been issued.

[17] First, the matter of certainty of subject matter, whether the property which formed the subject matter of the SPA is the same subject property under the principal agreement, the second and third agreements but more importantly, whether it is the same property to which strata title has been issued to the first defendant. In our view, the answer is clearly in the affirmative.

[18] The property under the SPA is readily traced to and through the several agreements starting with the principal agreement made between the first defendant and the second defendant. The subject property of that principal agreement is clearly acknowledged in the SPA. Save for the differences in the size of the property in question and the details of the title in the master title, the other details identifying the subject matter or property in question are clear and the parties are not confused to the point where there is no *consensus ad idem* such as to invalidate the SPA. The differences are minor and can be and were easily explained away by the appellants and the witnesses called.

[19] The property under the SPA dated 5 August 2008 is described as Parcel DG-4 in a building in Block D in Taman Fadason and it forms part of lands held under Master Title No. H.S. (D) 99535, P.T. No. 16914 (formerly Lots 9016 and 9017) in the Mukim of Batu, District of Kuala Lumpur, measuring 840 sqf (see p. 124 CBD). This same description may be found in both the second agreement dated 13 June 2005 (p. 54 CBD) and the third agreement dated 4 July 2006 (see p. 64 of CBD), where the property is described in Schedule A as a shop-lot in Taman Fadason at Parcel No: 4, Floor No: G and Building No: Block D. Both agreements also state that the property is land held under Master Title No. H.S. (D) 99535, P.T. No. 16914 (formerly Lots 9016 and 9017) in the Mukim of Batu, District of Kuala Lumpur.

[20] On the other hand, the property in the principal agreement is described in the First Schedule as a "shop lot" located in Parcel No: 4, Building No: Block D, Floor No: G, where the "saleable area (parcel including accessories parcel) measured approximately 1,188 sqf. The property under the principal agreement is part of lands held under Master Title No. H.S. (D) 98840, P.T. No. 16279 (formerly Lots 9016 and 9017).

[21] The learned judge found that it could not be reasonably inferred that all the above referred to the same subject property. In the deed of assignment of tenancy, the property referred to as the "demised premises" was described as "All that shop lot of the said property." All this constituted discrepancies compounded by the fact that there is a difference in the size of the property – under the SPA, it is 840 sqf whereas under the principal agreement, it is 1.188 sqf were reasons why it could not be reasonably inferred that the plaintiffs' SPA with the fifth defendant concerned the same property referred to as "D-G-5" and/or "D-0-5".

[22] With respect, we disagree.

[23] The discrepancy, if at all there is one, appears to be in the description of the master title. Under the principal agreement, it is known as Master Title No. H.S. (D) 98840, P.T. No. 16279 (formerly Lots 9016 and 9017) whereas under the SPA, it is Master Title No. H.S. (D) 99535, P.T. No. 16914 (formerly Lots 9016 and 9017). Save for this discrepancy, the property is always otherwise described and recognised as a "shop lot", be it under the principal agreement or the SPA; or even the second and third agreements. This shop lot was always described as located in Parcel No. 4, Block D and Floor G in the development known as Taman Fadason. What appears to be overlooked is that in either case, the former lot numbers of the land in question is the same, that is, Lots 9016 and 9017.

[24] It is our view that the plaintiffs had adduced more than sufficient evidence on the positive identification of the property. SP2, the advocate and solicitor who attended to the second and third agreements as well as the assignment and novation agreements, testified that the subject property was the same at all times in all these agreements; how a clerk in his office by the name of Cik Mazni had made mistakes as she had used a template in the preparation of the agreements, as seen in the other similar transactions which SP2's firm had done for other clients. This is strong cogent and material evidence which the learned judge was not entitled to disregard.

[25] SP3 from the Kuala Lumpur Land Office had also testified and adequately explained away the discrepancy and offered confirmation that the property was one and the same. His evidence was however, erroneously not appreciated by the learned judge. There is no other property in issue; there are none suggested by the first respondent.

[26] As mentioned earlier, we are inclined to view the discrepancies and mistakes as misdescriptions which do not vitiate the SPA. Such an issue in any case is one more properly taken up by the contracting parties and not by the first defendant.

[27] As for the issue of non-fulfilment of the condition precedent, once again, this is an issue more properly canvassed by contracting parties. The fifth defendant has not contested the issue. In any event, cl. 2.1 confers a benefit to the appellants which they may choose to waive which we find they have in fact waived by the full payment of the purchase price. See Federal Court's decision in *Perbadanan Kemajuan Pertanian Selangor v. JW Properties Sdn Bhd* [2017] 8 CLJ 392.

[28] We agree with the submissions of counsel for the plaintiffs that the third defendant was not entitled to transfer the registration of the strata title in favour of the first defendant as the first defendant had already divested his interest in the property by virtue of the second agreement, the existence and

validity of which cannot be disputed. The third defendant held the property in trust for the plaintiffs as bare trustee as the plaintiffs had fully paid up the purchase price. Both the second and third defendants had notice of the fifth defendants' interest as assignee of the rights over the property. In law, these defendants as trustees, are therefore obliged to, at least to apply to court under O. 80 of the Rules of Court 2012 for a determination of the issue of the rights rather than to act unilaterally and transfer the strata title to the first defendant.

[29] Since the first defendant had already sold his interest to the fourth defendant under the second agreement, the first defendant now holds the property registered in his name as bare trustee for the plaintiffs.

[30] As for the claim against the sixth defendant, we find that the sixth defendant owes a duty of care towards the plaintiffs in respect of the matters complained of. The learned judge had found the pleadings against the sixth defendant wanting, that there was failure to particularise the allegations. This is para. 19 of the re-amended statement of claim:

> 19. The Plaintiffs will further contend in the alternative that if the Plaintiffs' rights as owners of the said Property pursuant to the SPA have been in any way diminished or lost or in any way adversely affected, this would come about as a result of the negligence of the 6th Defendant in failing as solicitors to take all steps to perfect the Plaintiffs' rights over the said Property pursuant to the SPA including keeping the Plaintiffs duly informed of all development pertaining to the said Property and/or in relation to the SPA, ensuring that all steps have been taken to ensure that the relevant strata title for the said Property upon issuance would be registered or registrable in the name of the Plaintiffs and/or otherwise advising the Plaintiffs of their rights in relation to the said Property and/or how such rights may be protected.

[31] In our judgment, the above is adequate in terms of pleading a case of negligence and the wherewithal of the allegations.

[32] However, whether such obligations in the respects exist in law and fact is entirely a different consideration. In this regard, we are of the concerted view that there was no case established against the sixth defendant and the claim was correctly dismissed and the appeal is therefore dismissed. In any event, given the pleaded claim, and in view of our decision, this alternative cause of action and remedy does not arise.

[33] In conclusion, we agree with the submissions of the plaintiffs that the learned judge had failed to have regard to the totality of evidence and had not properly appreciated the evidence. The overwhelming evidence is that the plaintiffs' claim was indeed proved on a balance of probabilities and ought to have been allowed.

[34] The appeal is therefore allowed in the terms as appearing at para. 20 at p. 81 of the record of appeal as follows:

(a) A declaration that the plaintiffs are the beneficial owners of the said property currently held under title PN(WP) 32992/M1/1/5, Lot No. 57297, Mukim Batu, Negeri Wilayah Persekutuan, Kuala Lumpur;

(b) A declaration that the first defendant is trustee for the plaintiffs of the property currently held under title PN(WP) 32992/M1/1/5, Lot No. 57297, Mukim Batu, Negeri Wilayah Persekutuan, Kuala Lumpur and is bound to account to the plaintiffs any legal estate or interest therein outstanding in relation to the property;

(c) An order directing the defendants to within seven days from the service of the order made herein to take all steps to vest the said property in the name of the plaintiffs as legal proprietor and beneficial owners thereof; and

(d) Liberty to apply.

[35] We further order costs to be paid by the first respondent to the appellants while we make no order as to costs against the other respondents.